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FILED

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURTBUQUERQUE, NEW MEXICO

FOR THE DISTRICT OF NEW MEXICO

MAR 2 2 2005

UNITED STATES OF AMERICA,

MATTHEW J. DYKMAN CLERK

Plaintiff.

V.

No. CV-05-0174 RB/RHS CR-04-862 RB

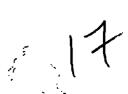
SEVERIANO VILLA-PEREZ,

Desendant.

MEMORANDUM OPINION AND ORDER

This matter is before the Court, sua sponte under 28 U.S.C. § 2255 R. 4(b), for preliminary consideration of Defendant's motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 16) filed February 15, 2005. Defendant pleaded guilty to an information and was convicted of reentry by a deported alien previously convicted of an aggravated felony. 8 U.S.C. §§ 1326(a)(1) and (2) and (b)(2). He was sentenced to 37 months of imprisonment, in part as a result of the prior aggravated felony conviction. § 1326(b)(2). Defendant did not appeal his conviction or sentence. In his § 2255 motion, Defendant claims his sentence is illegal because the Sentencing Guidelines were ruled unconstitutional in *Blakely v. Washington*, --- U.S. ---, 124 S. Ct. 2531 (2004). He does not deny that he was previously deported after committing an aggravated felony.

Because Defendant's sentence enhancement was based on a prior conviction, no relief is available on his claim under *Blakely*. The claim is precluded by the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."



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Apprendi, 530 U.S. at 490. Apprendi addressed, in part, the ruling in Almendarez-Torres v. United

States, 523 U.S. 224 (1998), where the Court expressly upheld enhancement of a sentence based on

prior convictions. Almendarez-Torres, 523 U.S. at 246-47. The decision in Almendarez-Torres has

been criticized but not overruled. See Apprendi, 530 U.S. at 489-90. The "prior conviction"

exception to the Apprendi rule is specifically noted in the Blakely decision, 124 S. Ct. at 2536, and

in United States v. Booker, --- U.S. ---, 125 S. Ct. 738, 756 (2005). The Blakely decision does

not affect the enhancement of Defendant's sentence, and the § 2255 motion will be dismissed.

IT IS THEREFORE ORDERED that Defendant's motion to vacate, set aside, or correct

sentence under 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 16) filed February 15, 2005, is DISMISSED

with prejudice; and, pursuant to Fed. R. Civ. P. 58(a)(2)(A)(iii), United States v. Sam, No. 02-2307,

2003 WI. 21702490, at *1 (10th Cir. July 23, 2003), judgment will be entered in accordance with

this order.

UNITED STATES DISTRICT JUDGE

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